on a day to day basis from the date of breach with the date of actual completion to be used for the purpose of calculating the maximum days claimable. Thus, even a day after the date of breach liquidated damages could be ascertained under clause 17. In any event, if the present Statement of Claim had been filed on or before September 17, 1981, no court could have struck it out as disclosing no cause of action merely because the maximum liquidated damages claimable were not quantified. The action was not an ordinary claim for money due and owing, the sum of which ought to be ascertained. It was also different from the cause of action in *Cheshire County Council* v. *Hopley (ante)* where the claim was based on an agreement wherein the ingoing tenant agreed to pay compensation which "may be due" from the County Council and as such it was held that time did not run until the amount of compensation was ascertained as it might well be that there was no money due. In *Monckton* v. *Payne (ante),* the cause of action was to recover an arbitrary fine payable by the defendant on her admission to the copyhold of her late husband. The action was held statute-barred as it was filed more than six years after her admittance to the copyhold. The delay was due to the plaintiff's failure to assess the fine within the statutory period of limitation. We fail to see how these authorities could support the legal proposition which the appellant sought to establish.

In the circumstances we held that the claim was statute-barred.

Appeal dismissed.

Solicitors: *Joginder Singh & Co.; Mohamed Akhir & Partners.*

ONG KIM HAI v. KUSAINI BIN SURIP

[F.C (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) June 18 & 19; July 12, 1984]

[Kuala Lumpur — Federal Court Civil Appeal No. 307 of 1983]

Tort — Action for damages arising out of road accident — Finding of trial judge — Failure to draw proper inferences from evidence available — Whether appeal court can interfere — No assessment of general damages by trial judge.

Damages — Road accident — No assessment of general damages by trial judge.

This was a claim by the appellant for damages arising from an accident between two motor cycles. The two motor cycles were travelling in the same direction, the respondent travelling behind the appellant. The learned trial judge after hearing the evidence of both the plaintiff and the defendent found that they gave conflicting versions of the accident and she proceeded to seek assistance from the other silent evidence, that is, the pleadings, the sketch plan, damages to the vehicles and the police photographs to decide which of the two versions could be accepted as probably the true version. She held that the appellant was wholly to blame for the accident and absolved the respondent from any blame and accordingly dismissed the action. The parties had agreed on special damages and future loss of earnings but the learned judge did not assess the quantum of general damages. The appellant appealed.

Held: (1) the learned trial judge had failed to draw the proper inferences from the evidence available. In this case the respondent could not be wholly absolved from blame and in the circumstances the blame should be apportioned 75% as the appellant's share and 25% as the respondent's share;

(2) as the learned trial judge had not assessed the general damages the case would be remitted to her for assessment of the general damages.

Cases referred to:

(1) *Kerry* v. *Carter* [1969] 1 W.L.R. 1372, 1376.
(2) *Murugan* v. *Lew Chu Cheong* [1980] 2 M.L.J. 139.
(3) *Jones* v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608, 615.
(4) *Challoner* v. *Williams* [1975] 1 Ll. L.R. 124.
(5) *Yeoh Cheng Han* v. *Official Administrator* [1972] 2 M.L.J. 7.

FEDERAL COURT.

M.A. Krishnan for the appellant.
Miss Shu Lee King for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): The claim before the trial judge was for damages arising from an accident between two motorcycles occurring near a junction at the 18th milestone Kuala Lumpur/Rawang main road. The two motorcycles were travelling in the same direction, that is, from Kuala Lumpur towards Rawang, the respondent travelling behind the appellant.

As stated in the opening remarks of the judgment of the trial Judge, only two issues were to be decided by the Judge namely (1) liability and (2) quantum on general damages since the parties had agreed to special damages at $10,910/- and future loss of earnings assessed at $59,800/-.

As regards liability the learned Judge held that the plaintiff there (appellant now) was wholly to blame for the accident and absolved the respondent from any blame whatsoever and accordingly dismissed the action with costs.

What transpired before the learned Judge was that after hearing the evidence of both the plaintiff and the defendant she found that they gave conflicting versions of the accident, whereupon she proceeded to seek assistance from the other silent evidence itemised in her judgment as the pleadings, sketch plan, damages to the vehicles and the police photographs to decide which of the two versions could be accepted as probably the true version.

It would appear that the trial Judge rejected the version of the appellant primarily because she found the damages to the appellant's motorcycle more consistent with the respondent's version of the accident and that the police photographs of the damages of the appellant's motorcycle did not substantiate his evidence that the respondent's motorcycle knocked his motorcycle "from the rear".

In our opinion apart from the fact that the use of the words "from the rear" or "from behind" appearing both in the evidence of the appellant (page 15) as well as in the police report (page 38) ("dari belakang") is only a manner of expression since both motorcycles were proceeding along the same direction with the respondent's motorcycle following behind, the learned Judge would seem to have overlooked the more pertinent and salient features of the evidence all of which incidentally appear at page 20 of the appeal record. First, it was not disputed that the respondent knew that there was a junction just at the point of collision. In his evidence he said he could see 100 feet ahead of him and that when he first saw the plaintiff he was about 50 feet away from the junction. Secondly in his own evidence the respondent said that he had been following the appellant for half a mile consistently at a safe distance, that is 100 feet behind the appellant travelling at a speed of 35 m.p.h. But nearing the junction the respondent's motorcycle came closer to the appellant's motorcycle which meant that the appellant had slowed down. It was here that the respondent admitted to overtake the appellant when he was about 5 feet away from the junction. Thirdly immediately before overtaking the respondent gave two signals of his intention to overtake.

It was the respondent's case in the court below that the appellant suddenly swerved to the right and the trial Judge found that the appellant had suddenly cut across the path of the respondent and that the respondent had not acted recklessly in attempting to overtake the appellant near the junction.

As can be seen the trial Judge preferred the version of the respondent purporting to rely on the silent evidence but failed however to draw the proper inferences from the evidence available. The finding of a trial Judge on which of the two conflicting versions of an accident is to be believed would normally be unassailable unless the appellate court on reviewing the evidence forms the opinion that the Judge was clearly wrong. The approach to the exercise of the power available to an appellate court is as stated by Lord Denning M.R. in *Kerry* v. *Carter*[1] where he said:

> "I think that the attitude of this court was correctly stated in that case (*Brown* v. *Thompson* [1968] 1 W.L.R. 1003 at p. 1012, by Edmund Davies L.J. when he quoted from the judgment of Sellers L.J. in *Qunitas* v. *National Smelting Board* [1961] 1 W.L.R. 401, 409). This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts; but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong."

The learned Judge could have been under the impression that the appellant's motorcycle suddenly turning across the respondent's path was crucial as in the case of *Murugan* v. *Lew Chu Cheong*.[2] But the facts of this case are not on all fours with *Murugan*.

The learned Judge held the appellant wholly to be blamed. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he might be hurt himself. See *Jones* v. *Livox Quarries Ltd.*[3]. We would also adopt the approach in *Challoner* v. *Williams*[4] where Megaw L.J. at page 126 said:

> "I would not for one moment disagree with the view that no one who is minded to turn his car across the road had got a duty, and a high duty, of care to traffic that may be using that part of the road and may be inconvenienced or put in danger by the manoeuvre of a car turning across. That applies both to traffic coming in the other direction, with which one would normally primarily be concerned, and also with the possibility that someone may be seeking to pass the turning car, travelling in the same direction."

In our view the same duty would also apply to the appellant as a motorcyclist in similar circumstances. But was the respondent wholly to be absolved from blame? He had been following the appellant for half a mile, travelling at about 35 m.p.h. He himself must have noticed that the appellent had slowed down and he also saw a junction 50 feet ahead. Would merely giving two signals before overtaking relieve him of any responsibility for the accident in the circumstances of the case? We do not think so.

We accordingly apportion the appellant's share of the blame as 75% and the respondent 25%.

As regards special damages and future loss of earning, they had been agreed. As stated in the grounds of judgment of the learned Judge there was only the quantum on general damages before the trial Judge but no award was however made. We would like to repeat what Gill F.J. (as he then was) said in this court in *Yeoh Cheng Han* v. *Official Administrator.*[5]

"Coming to the question of damages, it is a matter for regret that the learned Judge did not proceed to assess them on the assumption that the matter might go up to a higher court. As has been said in some cases before, it is very desirable for a trial judge to do so even if he comes to the finding that the action must fail."

We accordingly remit the case back to the trial Judge for assessment of general damages.

Costs to the appellant to be taxed. Deposit it to be refunded.

Order accordingly.

Solicitors: *James Foong & Anad; V.P. Nathan & Partners.*

APEX PHARMACY HOLDINGS SDN. BHD. v. CHEE CHIN

[F.C. (Salleh Abas L.P., Wan Suleiman & Hashim Yeop A. Sani F.JJ.) May 20 & July 13, 1984]

[Kota Bharu – Federal Court Civil Appeal No. 303 of 1983]

Contract – Agreement for Lease – Lessor purporting to be registered owner of premises – Lessor not a native of Kelantan – Attempt to circumvent the law and deceive the public authority – Agreement void – Whether person who paid premium for lease entitled to refund – Kelantan Land Enactment, 1938, s. 104 – Contracts Act, 1950, s. 66.

In this case the appellant sued the respondent for the refund of $15,000/- paid as premium under an agreement of lease. In the agreement the respondent was described as the registered owner of the land. In fact he was not the registered owner and he so described himself to circumvent the provisions of section 104(1) of the Kelantan Land Enactment. The respondent was not a native of Kelantan. The learned President of the Sessions Court dismissed the appellant's, claim and the appeal before the High Court was also dismissed. The appellant appealed.

Held: (1) since the respondent was not a person qualified to grant a lease and since the agreement was for the avowed purpose of deceiving a public authority, the agreement must be regarded as void and of no effect. Under section 66 of the Contracts Act the appellant was accordingly entitled to a refund of the premium;

(2) after the notice of repudiation by the respondent the parties agreed to have a tenancy conditional upon the installation of electricity in the premises. The installation of electricity was delayed and the appellant was entitled to rescind the agreement. However its claim for damages was not supported by satisfactory evidence and should be dismissed.

Cases referred to:

(1) *Arkwright* v. *Newbold* (1880) 17 Ch.D. 301, 328.
(2) *Lee Pooi Chun* v. *Lee Kah Gee* [1971] 2 M.L.J. 67.
(3) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] M.L.J. 143.
(4) *Margaret Chua* v. *Ho Swee Kiew & Ors* [1961] M.L.J. 173.
(5) *Parker* v. *Taswell* 2 De G. & J. 559; 44 E.R. 1106

FEDERAL COURT.

Datuk H.L. Wrigglesworth for the appellant.
C. Jegathesan for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): The appellant, Apex Pharmacy Holdings Sdn. Bhd., sued the respondent in the Sessions Court at Kota Bharu for the refundment of a sum of $15,000/- paid as premium under an agreement for a lease dated February 6, 1980. The learned President of the Sessions Court dismissed the claim with costs. The appeal before the learned Judge of the High Court Kota Bharu was also dismissed with costs.

The statement of claim before the Sessions Court described what was thought to be the